MOHAMED BIN OKI & ANOR. v. LAU HIENG MING & ORS.

[O.C.J. (Tan Chiaw Thong J.) January 29, 1980]
[Borneo — Originating Motion No. 2 of 1979]

Land Law — Caveat — Application to remove — Burden of proof on caveator — Whether caveator "beneficially interested in any land . . ." — Land Code, ss. 173 & 177.

The applicants in this case were the registered co-proprietors of a piece of land at Kampong Nyabor, Sibu. They sought to apply for the removal of a caveat lodged by the first respondent against their respective shares in the said land. Before the hearing, the proceedings against the other respondents were withdrawn; leaving the first respondent as the only respondent in the proceedings.

The first respondent lodged the said caveat by virtue of two separate agreements entered into by him with the applicants. The said agreements which were identical in terms stated that the first respondent had agreed to construct a concrete shophouse on the applicants' land at the respondent's own expense. The plan was subject to the approval of the Government and the land was to be shared by the parties equally.

Held, allowing the application: (1) the onus is upon the caveator to satisfy the court that on the evidence presented to it, his claim to an interest in the property caveated does raise a serious question to be tried; and having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo*;

(2) the said two agreements did not appear to be written documents relating to the transfer of or other dealing with, land, or evidencing title thereto, so that it could not be said that the first respondent was a person claiming to be entitled to or to be beneficially interested in the respective shares of the applicants in the said land by virtue of an unregistered agreement or other instrument. The first respondent could only claim to have contractual rights under the agreements as a building contractor;

(3) there is no question of any alleged contractual rights of the first respondent being capable of specific performance because an order for specific performance of the agreement, in the circumstances, would be tantamount to authorising the first respondent to construct shophouses on land meant solely for residential purposes, that which is prohibited by the document of title of the said land, rendering the said land liable to forfeiture under section 33 of the Land Code.

Cases referred to:-

(1) *Nanyang Development (1966) Sdn. Bhd.* v. *How Swee Poh* [1970] 1 M.L.J. 145.
(2) *Eng Mee Yong & Ors.* v. *Letchumanan* [1979] 2 M.L.J. 212.
(3) *Kasivisvanathan Chettiar* v. *Pereira* [1976] 2 M.L.J. 110.
(4) *In re An Arbitration between Mahmoud and Ispahani* [1921] 2 K.B. 716.
(5) *St. John Shipping Corporation* v. *Joseph Rank Ltd.* [1956] 3 All E.R. 683, 687.
(6) *Concrete Buildings of New Zealand Ltd (in liquidation)* v. *Swaysland* [1953] N.Z.L.R. 997.

ORIGINATING MOTION.

Christopher Sawan for the applicants.

First respondent in person.

Cur. Adv. Vult.

Tan Chiaw Thong J.: The applicants are the registered co-proprietors of the land described as Lot 579, Block 4, Sibu Town District containing an area of 0.518 acre, more or less, and situate at Kampong Nyabor, Sibu (hereinafter called "the said land").

By this originating notice of motion, the applicants are applying to the court under section 177 of the Land Code for the removal of a caveat lodged by the 1st respondent against their respective shares in the said land. Before this hearing, the proceedings against the other respondents were withdrawn, leaving the 1st respondent as the only respondent in these proceedings. The 1st respondent lodged a caveat against the respective shares of the applicants in the said land under section 173 of the Land Code by virtue of two separate agreements entered into by him with the applicants. It is common ground that these are the agreements on which he based his claim to a caveatable interest against the respective shares of the applicants in the said land. Copies of these agreements together with copies of certified true translations thereof in English are exhibited in the supplementary affidavits of the applicants.

At the outset I shall deal with the onus and standard of proof. It seems clear on the authorities of *Nanyang Development (1966) Sdn. Bhd.* v. *How Swee Poh*(1) and the Privy Council case of *Eng Mee Yong (f) & Ors.* v. *Letchumanan*(2) that in an application made under section 177 of the Land Code for the removal of a caveat, where such an application is made by the registered proprietor or co-proprietors of land under the Land Code, the onus is upon the caveator to satisfy the court that he has a caveatable interest in the said land or in the respective shares of the co-proprietors of the said land. As regards the standard of proof, it is clear from the *Eng Mee Yong's* case that the onus is upon the caveator to satisfy the court that on the evidence presented to it, his claim to an interest in the property caveated does raise a serious question to be tried; and having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo*. It is to be noted that in the judgment of the *Eng Mee Yong's* case, the standard of proof which appears to have been laid down in the *Nanyang Development's* case, *supra* and the case of *Kasivisvanathan Chettiar* v. *Pereira*(3) was disapproved. It is true that the *Nanyang Development's* case and the *Eng Mee Yong's* case involved applications made under section 327 of the National Land Code, but in my judgment, the provisions of section 327 of the National Land Code are substantially similar to those in section 177 of our Land Code, so that the above decisions in the *Nanyang Development's* case and *Eng Mee Yong's* case quite clearly apply to applications made under section 177 of our Land Code.

The two agreements on which the 1st respondent based his claim to a caveatable interest in the said land or, to be more exact, in the respective shares of the applicants in the said land are short in contents. They are identical in terms and I shall set out *verbatim* the relevant portions of each of these agreements:

"Subject to the abovementioned land title (referring to the title issued by the Land and Survey Department, Sibu — words within brackets mine) being issued by the Lands & Surveys I/We on this 3rd day of July, 1977 make an agreement according to the following terms and conditions that is:—

(1) That Encik Lau Hieng Ming (contractor) has agreed to construct concrete shophouse on the former kampong land in accordance with the plan as approved by the Government and the same upon completion to be shared

by the parties on equal share (i.e. contractor 50% and landowner 50%).

(2) That the costs of constructing and any other incidental expenses incurred in connection with the said development shall be wholly borne by the said Lau Hieng Ming.

(3) That Encik Lau Hieng Ming has declared that if (I/We) wish to borrow money for the purpose of moving from the old house it can be done without interest in accordance to proper procedure.

(4) I/We hereby agree to affix our signatures below."

At the bottom of each agreement, it is stated that: —

"On this day I/We have received $500.00 from Lau Hieng Ming as a sign of an agreement that money is as deposit and in the event of breach will have to pay damages of $5,000.00 (Ringgit Five Hundred only)."

The first point to note about these agreements is that they are agreements made subject to or conditional upon a land title being issued in respect of the said land by the Land & Survey Department. It is only on the happening of such an event that the terms and conditions of the said agreements are to be executed by the parties therein. Learned counsel for the applicants has submitted that these agreements contravened the provisions of section 8 of the Land Code relating to the prohibition against any non-native acquiring any rights or privileges over any Native Area Land, Native Customary Land or Interior Area Land. However, on a true construction of the said agreements, it would appear that the agreements were not made with the view of conferring any such rights or privileges upon the 1st respondent because in each case the agreement quite clearly states that it is to be subject to a land title being issued by the Land & Survey Department. In my view, this must be taken to mean that a proper land title enabling the terms and conditions of the said agreements to be carried out is issued by the Land & Survey Department. I do not therefore consider that the said agreements being made subject to a proper land title being issued by the Land & Survey Department enabling the execution of the said agreements be effected constitute a breach of the provisions of section 8 of the Land Code.

As mentioned the caveat lodged by the 1st respondent was under section 173 of the Land Code. In the circumstances of the instant proceedings, the relevant provisions of that section are contained in paragraph (a) of that section which reads: "Any person claiming to be entitled to or to be beneficially interested in any land, estate or interest under this Code by virtue of any unregistered agreement or other instrument or transmission or of any trust express or implied or otherwise may at any time lodge with the Registrar a caveat in Form 0 in the First Schedule." In my judgment, in the circumstances of the instant proceedings, paragraphs (b) and (c) of the said section do not apply. It is to be borne in mind that under the provisions just quoted, the onus is upon the 1st respondent to satisfy the court in accordance with the standard of proof as set out in the *Eng Mee Yong's* case, mentioned above, that he is a person claiming to be entitled to or to be beneficially interested in the respective shares of the applicants in the said land or in any estate or interest therein by virtue of any unregistered agreement or other instrument. To my mind, the claim must be "by virtue of any unregistered agreement or other instrument", and in my view the words "or other instrument" must be read as being *ejusdem generis* with the words "any unregistered agreement" in the context where they appear particularly having regard to the definition of "instrument" in section 2 of the Land Code. That this is so to my mind is indicated by the presence of the word "other" in the context just quoted. The word "instrument" as defined in section 2 of the Land Code means any printed or written document relating to the transfer of, or other dealing with, land, or evidencing title thereto, but does not include a caveat. The word "dealing" in the same section is defined as meaning every transfer affecting any estate or interest under the Land Code. The two agreements do not appear to be written documents relating to the transfer of or other dealing (as defined) with, land, or evidencing title thereto, so that in my view it cannot be said that the 1st respondent is a person claiming to be entitled to or to be beneficially interested in the respective shares of the applicants in the said land by virtue of an unregistered agreement or other instrument. If I am wrong on this, the next question to consider is whether the terms of the respective agreements can be said to otherwise constitute the 1st respondent a person to be entitled to or to be beneficially interested in the respective shares of the applicants in the said land. Learned counsel for the applicants has quoted authorities to show that where an agreement is made dealing with the matter which is prohibited by the law (statute or otherwise), then such an agreement is illegal and void and therefore cannot be enforced. I think that this legal proposition is clearly established by the authorities. In this connection, I only need to quote the cases of *Re An Arbitration between Mahmoud and Ispahani*[4] and *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[5] as well as the case of *Concrete Buildings of New Zealand, Limited (In Liquidation)* v. *Swaysland.*[6] In this respect, it is to be observed that each of the two agreements was made, as already stated, subject to land title being issued by the Land & Survey Department. The relevant document of title to the said land, a copy of which is exhibited in the affidavits of the applicants, was not issued until October 25, 1978, some time after the agreements were entered into, and registered in the Land Registry on the same day. It is clear that the two agreements by clause 1 thereof stipulate that a concrete shophouse or shophouses are to be built on the said land. This may only be done if it is consistent with and not contrary to terms and conditions imposed in the land title. This is not the case here. The document of title under that part thereof headed "Restrictions and Special Conditions" contains the following conditions and restrictions: "(1) This grant is issued pursuant to section 18 of the Land Code; and (2) This land is to be used only for residential purposes." It seems clear that the second special condition or restriction does not allow the building of any shophouse on the said land. Whether this special condition or restriction may be removed or modified is a matter in relation to which no evidence is before me and it is idle for the court to speculate on the matter. Hence, on the evidence as filed in this court, the building of a shophouse or

shophouses on the said land under the agreements would clearly contravene the special condition or restriction in the document of title to the said land which had already been quoted. This in turn would render the said land liable to forfeiture under section 33(1) of the Land Code, the relevant provision of which reads: —

"There shall, by virtue of this section, be implied in every document of title the condition that in case of a breach of, or a default in, the observance of any of the conditions of the said document of title, whether expressed in the said document of title or contained in or implied by this Code or by any written law repealed by this Code or in any previous order of the Rajah affecting land, the Superintendent or other officer authorized by him may, on behalf of the Government, declare the estate or interest secured by that document of title to be forfeited and re-enter that land or the portion thereof in respect of which the breach or default occurs."

As matters stand on the evidence filed in this court, it is my view, and I hold, that even if it can be said that the 1st respondent has an interest in any part of the said land by virtue of the agreements, that interest would be contrary to the provisions of section 33(1) of the Land Code and the court should not lend support to the protection of that interest. As has already been mentioned, I am not here concerned with whether or not the restriction as to user of the land may be modified or removed as there is no evidence before me on the matter.

Paragraph 3 of the affidavit in opposition of the 1st respondent alleges that the applicants had willingly agreed to give half of the "shophouse" after the "shophouse" had been erected on the said land in consideration of the 1st respondent bearing the costs of constructing and developing the said "shophouse" on the said land. In this respect, the applicants must have been legally enabled to do what they were alleged to have authorised the 1st respondent to do; but in view of what I have stated as to the condition or restriction as to user, it seems clear on the evidence that they are legally unable to do so.

Paragraph 5 of the said affidavit alleges that the agreement was not a devise or a contract to dispose of the said land, but rather a way of engaging and paying the contractor to construct the shophouses on the said land. If that were so, then to my mind, such allegation indicates that all that the agreement did was that the applicants undertook to engage and pay the 1st respondent to construct shophouses on the said land. In such circumstances, it is abundantly clear that he cannot claim himself to be a person entitled to or to be beneficially interested in the said land or any part thereof or any estate or interest therein. He can only claim to have contractual rights under the agreements as a building contractor.

For the reasons stated, I hold that the 1st respondent has not succeeded in discharging the onus placed upon him in satisfying this court on the evidence presented to it that his claim to a caveatable interest in the said land or any part thereof does raise a serious question to be tried; so that the question of his being able to satisfy the court that on the balance of convenience it would be better to maintain the *status quo* does not arise. In the "Torrens System in Malaya" by *S.K. Dass* at page 324, it was there stated that "the primary test for a caveatable interest may be put on an alternative basis: is the right of the person lodging a caveat capable (i) of specific performance or (ii) of being protected by an interim injunction? 'The close analogy between injunctions and caveats, and the peculiar applicability of the remedy by injunction in the case of land under the Torrens system suggests that the true principle, which should govern the question whether an interest be caveatable or not, is that a caveat may be entered under circumstances which would justify an injunction being granted by the courts; at the same time it must be remembered that given the caveator's interest a caveat may be entered as a matter of right under circumstances which might not call for the immediate intervention of the courts'." (See *Hogg*, A.T.S., p. 1039). Now, on the facts as found by me particularly with regard to the document of title of the said land being restricted as to user, namely, that it is confined to residential purposes only, it is quite clear that the primary test for a caveatable interest on an alternative basis as indicated in the passage which has just been quoted, applies here. There is no question of any alleged contractual rights of the 1st respondent being capable of specific performance because an order for specific performance of the agreement, in the circumstances, would be tantamount to authorising the 1st respondent to do something which is prohibited by the document of title of the said land, rendering the said land liable to forfeiture under section 33 of the Land Code; and likewise, there is no question in the circumstances of any such alleged right of the 1st respondent being protected by an interim injunction. Accordingly, for the reasons given, I make the order as prayed for in the originating notice of motion with costs in favour of the applicants. As to the applicants' claim for damages against the 1st respondent for wrongfully lodging his caveat, there is no evidence filed before this court and this part of the claim is accordingly dismissed, with the observation that it seems doubtful whether, in this connection, the correct procedure has been adopted.

Before leaving this case, I would say a word about what seems to have been implied in the submission of the 1st respondent. He seems to imply that if the applicants are now not willing to observe the terms and conditions entered in the agreement with him then he is entitled to damages. Whether or not he has a case to claim for damages against the applicants for breach of contract is a matter not before me and if the 1st respondent considers that he has a good cause of action, it is of course open to him to take separate proceedings against the applicants.

Application allowed.